90-1729

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM 1990

GEORGE MATUSKA,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure to recognize an affirmative defense in contravention of specific findings of fact denied the defendant due process of law?

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---

The petitioner, George Matuska, by his attorney, petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois, First District.

## OPINION BELOW

The Illinois Supreme Court entered an order on February 6, 1991 denying petitioner's Petition for Leave to Appeal. A copy of the order is reproduced in the Appendix at page 20a.

The Illinois Appellate Court, First District had entered an order on October 16, 1990, denying the petitioner's appeal. A copy of this order is reproduced in the Appendix at page 1a.

## JURISDICTION

The Judgment of the Illinois Appellate Court was entered on October 16, 1990. Leave to Appeal to the Illinois Supreme Court was requested and denied on February 6, 1991. This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The following constitutional provisions are set out at Apppendix page 21a:

United States Constitution, Fourth and Fourteenth Amendments.

## STATEMENT

On April 19, 1988, George Matuska lived at 815 East Oakton, Lot 271, Des Plaines, in a mobile home which he owned. (Report of Proceedings, hereinafter "R." 96). He rented the lot which the trailer was on. (R. 110). He had lived at that location for about ten years. (R. 96). At the time of trial he was fifty-two years old. (R. 96). A veteran, he had served in the United States Army for six years and received an honorable discharge. (R. 97). He was on medical disability, having worked as a installer/repairer for Centel Telephone Company of Illinois after leaving military service. (R. 97).

Matuska had an animal in a trap on his property. (R. 97-98). The animal had been there about seven days and

Matuska had asked the manager of the trailer park to have it removed. (R. 98). She had, however, refused. (R. 98). There were at least five signs posted restricting people from coming onto Matuska's property. (R. 99-100). These were "No Trespassing" and "Keep Out" signs, two of which were approximately one foot by seven or eight inches in size. (R. 100). Matuska would call the police when people trespassed on his property. (R. 111).

Matuska had walked to the grocery store around mid-day and then returned to his property. (R. 99). He was not expecting anyone on his property that day. (R. 99, 108). When he returned from the grocery store he saw a vehicle which he didn't recognize parked behind his van. (R. 99).

Three men were on Matuska's property. (R. 99). One man was Reuben Villareal, the maintenance foreman of the trailer park. (R. 99). Mr. Villareal was aware of the Matuska's policy that people remain off his property unless invited. (R. 111). At the time, Matuska didn't know who the other two men were. (R. 109). The second man was Allen Glisch (R. 100) who was a manager of the Illinois Citizen Animal Welfare League. (R. 14). The third man was William Lietz, who was also an employee of the animal welfare league. (R. 53, 102).

As Matuska approached, Glisch was attempting to twist the animal trap off its chain. (R. 100). Villareal said "Look out, here he comes." (R. 100). Matuska had said nothing. (R. 101).

Glisch had a hypodermic needle in his hand. (R. 101). He turned toward Matuska and tried to stick him with the needle. (R. 101). Lietz had grabbed Matuska by the shoulders and had thrown him to the ground. (R. 101). Matuska had an awl in his back pocket which he took out. (R. 101). He attempted to back his attackers off. (R. 101-102).

Lietz ran back to his truck and retrieved a length of pipe. (R. 102). He attempted to hit Matuska over the head with the pipe. (R. 102-103). Matuska thereupon went to his van and took out a crowbar. (R. 103). Lietz wrestled the crowbar from Matuska and threw him back down to the ground. (R. 103).

Matuska ran back to his trailer and brought out a gun, intending to get the keys from the truck to prevent the men

from getting away so that he could call the police. (R. 103-104). He did not have a phone in the trailer. (R. 104).

Matuska came outside the trailer with the gun and was standing on the steps of the trailer. (R. 104). He pointed the gun down at the ground and fired one shot. (R. 104). He then ran to the truck and took the keys so that the men could not get away before the police came. (R. 105). He went to the trailer, came out a second time and had the gun in his hand pointed at the ground. (R. 105).

When Matuska came out the second time, he saw a "bunch of men" some of whom were police officers. (R. 105). He was thereupon attacked, knocked to the ground and his gun was taken away. (R. 105). Matuska previously had had

encounters with one of the officers, Kevin Boyd. (R. 115). He believed his life was in danger. (R. 105).

Allen Glisch, the purported victim of the attempted murder and aggravated assault testified concerning his responsibilities with the Animal Welfare League. (R. 14-15). He would go out on "investigations" and "rescue animals that needed help." (R. 15). He testified he was on such an animal rescue mission on April 19th when he entered onto Matuska's property with Lietz and the trailer park maintenance man. (R. 16).

Glisch had not obtained permission to be on Matuska's property. (R. 32). He had no warrant or process to go on the property. (R. 32). He was aware the trailer park was private property. (R. 32). His truck was parked in the private

drive of the trailer park. (R. 32). He had been informed that the trailer was Matuska's property (R. 34) and he knew the animal was on Matuska's property. (R. 36). It was his policy to enter on private property and remove animals without securing the owner's permission if he felt the circumstances called for it. (R. 34).

Prior to going onto Matuska's property, Glisch knew Matuska's name. (R. 50-51). He, however, had no information indicating Matuska to be either dangerous or in anyway eccentric. (R. 51).

Glisch tried to remove the trap but was unable to do so because it was chained to the stairway of Matuska's trailer. (R. 17). He thereupon injected the skunk with a tranquilizer. (R. 17).

He testified he was standing alongside his truck when Matuska approached from the trailer. (R. 19). Glisch was not wearing any type of uniform. (R. 52).

As had Matuska, Glisch testified that a struggle between Matuska and Lietz ensued and Matuska fell to the ground. (R. 20). The maintenance man then drove away. (R. 40). Lietz testified he didn't touch Matuska as they scuffled (R. 63) and never touched the Matuska during the incident. (R. 66-67). Matuska got up and pulled a screwdriver like object (the awl) from his back pocket. (R. 22). Lietz thereupon climbed on top of their truck and brought down a four to six foot aluminum pole which Glisch admitted that Lietz tried to stick Matuska with. (R. 22, 64). Matuska thereupon brought the

crowbar out of his van. (R. 23). Glisch was never struck in any way by Matuska. (R. 41-42).

Glisch testified he was adjacent to a nearby fence when Matuska came from his trailer with the gun (R. 43) and that Lietz was not then present. (R. 47). Glisch testified he was thirty-five to fifty feet away from Matuska when the shot was fired. (R. 43).

Lietz testified he and Glisch were in their truck on the radio, when Matuska came out of the trailer with his gun. (R. 57). It was his testimony that he was separated by only 5 or 10 feet from Glisch when the shot was fired. (R. 57-58). He testified, he saw Matuska pull out the gun, aim and shoot. (R. 62). He did not see Matuska take the keys from the truck. (R. 67).

Matuska did not come toward Glisch with the gun in his hand. (R. 43). No other shots were fired. (R. 44). Glisch was not hit by the shot nor was he aware of any object being hit by the projectile. (R. 44). After firing the one shot, the Matuska went back into his trailer. (R. 45).

Shortly thereafter the police arrived. (R. 45). There were four policemen present. (R. 47). These four and Lietz wrestled the Matuska to the ground and took his gun away. (R. 47). When Matuska came out of his trailer the second time he did not raise the gun or point it at anyone. (R. 48).

Officer Christopher Terrazzino of the Des Plaines Police Department, arrived at the scene at the same time as Officer Kevin Boyd. (R. 72, 81).

the gun or point it at anyone. (R. 48).

Officer Christopher Terrazzino of the Des Plaines Police Department, arrived at the scene at the same time as Officer Kevin Boyd. (R. 72, 81). Terrazzino and Boyd encountered Glisch and Lietz and they all walked toward the trailer. (R. 72, 77). Matuska came around the side of the trailer and had the gun at his side. (R. 72-73). He did not point the gun at the officers (R. 78) and kept the gun at his side. (R. 78). He said something to the effect of "go ahead and kill me." (R. 73, 78). The officers grabbed Matuska, wrestled him to the ground and disarmed him. (R. 73).

Before the Appellate Court of Illinois the petitioner raised the question of his asserted trial defenses - how the court's findings supported his

asserted defenses, yet further contradicted specific findings of fact made that he had no intent to commit murder and that he had been acquitted of attempt murder.

In a Petition for Leave to Appeal to the Illinois Supreme Court the petitioner pointed to the findings of the trial court and the appellate court's acceptance of those findings. Petitioner argued the unwillingness to apply the law to the specifically found facts was the error which is alleged as violative of due process in this petition.

## REASONS FOR GRANTING THE WRIT

I. **THE DEFENDANT'S ACTIONS IN THIS CASE WERE LAWFULLY JUSTIFIED. HE WAS ACTING IN SELF-DEFENSE AND IN DEFENSE OF HIS PROPERTY. HE RAISED AN AFFIRMATIVE DEFENSE WHICH THE STATE HAD TO DISPROVE BEYOND A REASONABLE DOUBT. THE FAILURE TO REQUIRE THAT THE DEFENDANT'S AFFIRMATIVE DEFENSE BE OVERCOME BEYOND A REASONABLE DOUBT WAS A DENIAL OF DUE PROCESS OF LAW.**

The defendant in this case was an individual confronted by trespassers on his land. The defendant's testimony was emphatically clear that when he returned home from the grocery store he saw people on his property. (R. 99). He had at least five signs on his property restricting entry (R. 100) and he regarded uninvited persons on his property as trespassers. (R. 111).

The Fourth Amendment protecting as it does the right of the people to be secure in their person and in their homes

surely affirms the fundamental rights of our citizens to take reasonable steps to protect these guarantees. Individual security and privacy mean nothing if a citizen may not act to protect himself or his property.

Mr. Glisch, the animal welfare manager, admitted that he knew he was on private property. (R. 32, 34, 36). He further admitted he had made no effort to secure the defendant's permission, authorization from the police or a court to enter onto the property and remove the trap or animal. (R. 32). Glisch cavalierly testified, in fact, that it was his policy to enter private property without the owner's permission to remove animals if he felt the situation called for it. (R. 34).

The defendant stated when he first

saw Glisch he was attempting to twist the trap off its chain. (R. 100). This was the defendant's personal property chained to the steps of his home. (R. 97). Glisch confirmed that he tried to remove the trap but couldn't do so because it was chained to the steps of the trailer. (R.17).

After a physical struggle ensued (as described by all the witnesses) the defendant ran back into his home. (R. 103-104). At this point he produced a gun and fired a single shot.

The trial court specifically found that the defendant did not intend to kill the witness as alleged and thereupon found him not guilty of attempt murder. (R. 139). The trial court made certain additional specific findings, stating that the defendant's,

"... land was being violated, and he had signs all over his property; I believe five of them. He saw trespassers on his land. They were attempting to steal a very valuable trap. You heard evidence with respect to that." (R. 137).

The court further stated,

"I think what the defendant was doing there is really he did want to keep these people around until the police got there ... in fact did intend to keep the people present until the police arrived." (R. 141).

Accepting these findings, it must be concluded that the defendant's actions were not only in self-defense but were completely consistent with the lawful defense of his property, barring a finding of guilty as to the offense of aggravated assault. Illinois Revised Statutes, Chapter 38, Section 7-3 provides:

Use of Force in Defense of Other Property. A person is justified in the use of force against another when and to the extent that he reasonably

> believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than a dwelling) or personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.
>
> Ill.Rev.Stat., Chap. 38, Sec. 7-3.

In evaluating the defendant's argument on appeal as to his justifiable use of force in defense of property, the appellate court recognized that "a defendant is justified in the use of force against another when and to the extent he reasonably believes such conduct is necessary to prevent or terminate a trespass or tortious interference with his property." (People v. Matuska, Order, p. 5). The appellate

court however opined that "... any trespass that had occurred had terminated..." and that "[t]he use of force was not justified under the facts of this case." (Matuska, Order, p. 9).

Illinois courts have long recognized that "... the owner or occupant of land has the right to use any force necessary to remove a trespasser in situations where there is no time to resort to the law." People v. Goduto, 21 Ill.2d 605, 609, 174 N.E.2d 385 (1961) cert. denied 368 U.S. 927, 82 S.Ct. 361, 72 L.Ed. 2d 190. See also People v. Vaughn, 116 Ill.App. 3d 193, 451 N.E.2d 898 (5th Dist. 1983).

The appellate court in this case adopted an unduly and inappropriately narrow construction of the meaning of the terms "prevent or terminate" as they

relate to trespass on one's property. Any meaningful right to prevent or terminate a crime (trespass) must include the right to hold or arrest an individual until police arrive.

A private person's rights to use force in making an arrest and to prevent an escape are both recognized in the Illinois Criminal Code. Illinois Revised Statutes Chapter 38, Section 7-6 and 7-9.

Crime is "prevented" by arrest and prosecution, not merely by chasing an offender away from the scene of the crime. It is illogical and ill serves an enlightened view of crime prevention to suggest (as the appellate court's opinion does) that an individual whose property has been violated may use of force to drive an offender away but may not use force to keep that individual at a crime

scene until such time as police may take that offender into custody.

This defendant had persistent problems with trespassers on his property and had called the police when people trespassed. (R. 111). In this case, not only was the defendant's testimony uncontradicted as to the trespatory entry and riotous interference with his property; the trial court so found.

Where a defendant raises an affirmative defense by offering some evidence thereon, the burden is then on the State to prove the defendant guilty beyond a reasonable doubt on that issue as well as all other issues in the case. Illinois Revised Statutes, Chapter 38, Section 3-2. People v. Service, 48 Ill.App. 3d 231, 363 N.E.2d 57 (1st Dist. 1977).

When the defense of justifiable use of force is interposed, the State must prove that the actions of the accused were unjustified. The test of whether the use of force by a defendant charged with aggravated assault is justifiable is not whether the court thinks that the defendant's conduct is reasonable, but whether the defendant, acting as a reasonable man, thought his conduct was reasonable. (People v. Rickman, 73 Ill.2d 255, 391 N.E.2d 1114 (1st Dist. 1979). The actions of this defendant were reasonable, his use of force justifiable.

The findings of the trial court were consistent with a recognition of the defendant's justifiable use of force and the determination that the defendant was guilty of aggravated assault was

therefore error.

An individual acting in defense of himself and his property who does not react by using force likely to cause death or great bodily harm is within his right. Such were the actions of the defendant in this case.

To recognize an affirmative defense and specific findings made in connection therewith, yet to deny the asserted defense as a basis for a finding of not guilty denies an individual the fundamental fairness which is the essence of due process of law under the Fourteenth Amendment.

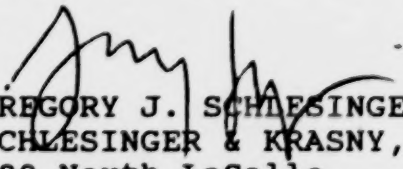
The appellate court in affirming this conviction takes a position which is detrimental to the interests of effective law enforcement, contrary to the interests of justice and contrary to

Illinois law and violative of the defendant's right to due process of law.

## CONCLUSION

For the reasons discussed above, we respectfully petition this Court to issue its Writ of Certiorari to the Applate Court of Illinois, First District to review that Court's judgment in the instant case.

Respectfully submitted,



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# APPENDIX

Second Division October 16, 1990
No. 1-89-2685

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee, )
)
v. )
)
GEORGE MATUSKA, )
)
Defendant-Appellant.)

Appeal from the Circuit Court of Cook County No. 88 C3 30232
Honorable Brendan J. McCooey,
Judge Presiding

O R D E R

Following a bench trial in the circuit court of Cook County, defendant George Matuska was found guilty of aggravated assault, resisting a peace officer, and possession of a firearm without a requisite owner's identification card. He was sentenced to 24 months conditional discharge. On

appeal defendant claims that he was not proven guilty of aggravated assault beyond a reasonable doubt.

On April 19, 1988, Allen Glisch, the manager of the Illinois Citizens Animal Welfare League, and an employee, William Lietz, went to defendant's trailer in Des Plaines, Illinois, to remove a skunk from a cage-like trap. They were not in a uniform but their truck was marked on the sides and rear with "Animal Welfare." Defendant's attorney had called Glisch about removing the skunk. Glisch and Lietz got directions to defendant's trailer from the trailer park manager and were guided there by Reuben Villareal, a maintenance man. Glisch and Lietz did not have any type of legal process to go on defendant's property and did not have defendant's permission. They parked

their truck on the road which was a private road of the trailer park.

When they knocked on the defendant's trailer door and did not receive an answer, Glisch tried to free the skunk from the cage which was chained to the stairs. Glisch injected a tranquilizer into the skunk, and while he and Lietz were standing by their truck, defendant came from the side of his trailer and yelled an obscenity at them. Glisch explained why they were there, but defendant began to scuffle with Lietz. At this point Villareal left. During the confrontation defendant slipped and fell and then pulled out an awl with which he jabbed at Lietz who in return went to the truck to get a long pole to ward off defendant. Meanwhile Glisch went toward the fence to get a trash can lid for

protection, but they were chained.

Lietz claimed that he did not hit defendant with the pole. However defendant then went to his vehicle and took out a crowbar which he swung at Lietz but did not hit him with it. Neither Lietz or Glisch were injured by defendant.

While defendant went inside his trailer, Lietz left to call the police according to Glisch. Defendant then emerged with a pistol while Glisch was standing by their truck. Defendant went to their truck, removed the keys, and then fired at Glisch who had moved toward the fence about 35 to 50 feet away.

Lietz testified, however, that after defendant went into the trailer, he and Glisch went back to the truck. Glisch was inside the truck trying to call for

help on the radio when defendant came with a gun. Glisch said, "he's got a gun," and he and Lietz went across the street to the corner. They were separated by 5 to 10 feet in the same general direction. Defendant pointed the gun in their direction but more so at Glisch and fired. Lietz then went to the end of the block to call the police.

After the gunshot defendant went back into his trailer until the police arrived. Defendant then came outside with the gun. While he would not drop it when ordered to by the police, he did not raise the gun or point it at anyone at this time. Defendant said, "Go ahead and kill me." The police ultimately wrestled defendant to the ground, took the gun away and handcuffed him.

John Giovanni was driving in the

trailer park when he thought he heard a gunshot, then saw defendant pointing a gun at him and heard an officer say "drop it." Giovanni then got out of his vehicle and assisted the police in subduing defendant.

There was a stipulation that defendant did not have a firearm owner's identification card.

Defendant testified on his own behalf that he had asked the park manager to remove the skunk, but when his request was refused, he did not contact anyone else about it. When defendant came home, he saw Villareal but did not know Glisch and Lietz. He saw their truck parked in what he considered his parking place, but he did not read the lettering on it. At that time Glisch was trying to twist the cage off the chain. Villareal said,

"Look out, here he comes," but defendant said nothing. Glisch then tried to stick defendant with a hypodermic syringe and Lietz threw him to the ground.

In response defendant pulled out an awl to keep Lietz away. Lietz then came at defendant with a pipe and tried to hit him on the head. Defendant went to his vehicle and got a crowbar, but Lietz took it away from him in a struggle as defendant was knocked down again.

At this point defendant went into his trailer and got a gun. He said that he wanted to get the keys out of their truck so they could not get away. Defendant did not have a telephone, and he wanted to keep Glisch and Lietz there until the police arrived so he went outside and stood on the trailer steps. When defendant saw Glisch near their

truck about 35 feet from the trailer, he fired the gun in the direction of the truck but aimed at the ground. Defendant then took the keys of the truck and went inside his trailer.

While defendant was inside, he thought that the "second man" might have another set of keys and they would leave. He went back outside with the gun only to see the police approaching him with a gun pointed at him. The police then attacked him. Defendant said that he had had previous negative encounters with one of the officers and he thought they were going to kill him. During the struggle they knocked him to the ground and took the gun away.

The trial court found that defendant's state of mind at the time of the incident was that there were

trespassers on his property trying to steal his animal trap. The court also noted that defendant had made previous complaints to the police which were ignored in defendant's opinion, and defendant wanted to vindicate himself with the police by producing the "criminals." The court therefore acquitted defendant of attempted murder because he lacked the specific intent to kill Glisch. However, because defendant did point the gun in the general direction of the witness, he was found guilty of aggravated assault.

Defendant contends that he was not proven guilty beyond a reasonable doubt because he was justified in firing the gun in defense of his property. (Ill.Rev.Stat. 1987, ch. 38 par. 7-3) He also claims that he acted in self-

defense. Ill.Rev.Stat. 1987, ch. 38, par. 7-1.

Justifiable use of force is an affirmative defense, and once raised the State has the burden of proving defendant guilty beyond a reasonable doubt as to that issue as well as the other elements of the offense. (People v. Sedlacko (1978), 65 Ill.App.3d 659, 382 N.E.2d 363.) With self-defense defendant must show that he was not the aggressor; that he was confronted with the threat of imminent, unlawful force; that the use of force was necessary to avert the danger; and that the amount of force was justified under the circumstances. (People v. Jones (1988), 176 Ill.App.3d 460, 531 N.E.2d 88.) Also, defendant is justified in the use of force against another when and to the extent he

reasonably believes such conduct is necessary to prevent or terminate a trespass or tortious interference with his property. (People v. Vaughn (1983), 116 Ill.App.3d 193, 451 N.E.2d 898.) A trial court's findings on these elements raise questions of fact which a reviewing court will not disturb unless the evidence is so unsatisfactory as to justify a reasonable doubt of guilt. (People v. Stokes (1989), 185 Ill.App.3d 643, 541 N.E.2d 1129) The question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Young (1989), 128 Ill.2d 1, 538 N.E.2d 453.

Defendant argues in support of his

issue that the State's evidence was inconsistent and contradictory. He points out that Glisch testified that Lietz and defendant were involved in a "scuffle" or a "struggle" and tried to knock one another aside. However, Lietz testified that he never touched defendant.

The trial court, as the trier of fact, determines the credibility of the witnesses and the weight accorded their testimony. (People v. Florey (1987), 153 Ill.App.3d 530, 505 N.E.2d 1096.) The record does not indicate that Glisch's and Lietz testimony on this matter was so inconsistent that a reasonable doubt of guilt arose. Glisch did not actually state that Lietz touched defendant during their "struggle" or "scuffle." He said that they "tried" to fight one another

and knock each other aside. He specifically said that Lietz did not knock down defendant or subdue him. Lietz testified that he "scuffled" with defendant and that he swung at defendant after defendant swung at him. Glisch said that Lietz "threw fists" at defendant in defense.

The other inconsistency cited by defendant is the differences between Glisch's and Lietz' testimony regarding their positions when defendant came outside the first time with the gun. Glisch did not mention that he was going to call for help on the truck radio. While Glisch did say that he was alone when defendant fired the gun, Lietz said that he and Glisch were separated by 5 to 10 feet in the same general direction. It may have been that Lietz could see

Glisch from his position, but Glisch could not see Lietz. Defendant did testify that Glisch was near the truck when he fired the gun. Lietz went to get the police after the shot.

In any event the fact that Glisch's and Lietz' testimony on both points raised by defendant was inconsistent and contradictory, does not require our conclusion that their testimony was unreasonable or improbable. (See People v. Willard (1980), 92 Ill.App.3d 74, 414 N.E.2d 504.) Their credibility and the weight accorded their testimony was for the trier of fact, and the evidence is not so improbable as to raise a reasonable doubt of defendant's guilt as their testimony was not undermined by these discrepancies. (See People v. Pietruszynski (1989), 189 Ill.App.3d

1071, 545 N.E.2d 942.) We note further that even if defendant's version were credible, his defenses were rejected because the record shows that the circumstances did not justify his action of firing a gun in the general direction of Glisch.

Defendant refers to the testimony of John Giovanni. Giovanni was not a witness to the shooting but arrived afterward. His testimony did not serve to contradict Glisch's or Lietz' testimony on this point.

Since the trial court found defendant not guilty of attempted murder, he argues that this showed that the court also determined that he had no intention and did not use force likely to cause death or great bodily harm. Apparently defendant is referring to that part of

the self-defense and defense of property statutes which concern the amount of force justified under the circumstances. (Ill.Rev.Stat. 1987, ch. 38, pars. 7-1 and 7-3.) However, this result does not flow from the court's finding that the evidence did not prove a specific intent to kill on defendant's part. Specific intent to kill is required for an attempted murder conviction. (People v. Spiezo (1989), 191 Ill.App.3d 1067, 548 N.E.2d 561.) However, just as murder can be proven without showing a specific intent to kill or do great bodily harm (People v. Gross (1988), 166 Ill.App.3d 413, 519 N.E.2d 1043), defendant could be found to have used force intended or likely to cause death or great bodily harm to defend himself or his property and not be found guilty of attempted

murder. A finding that defendant did not specifically intend to kill does not require a finding that defendant was justified in shooting a gun in the direction of the witnesses.

The trial court found defendant guilty of aggravated assault and the evidence supports its finding beyond a reasonable doubt. Although defendant claims that the evidence showed he was defending his property, under the statute the use of force is justified "to prevent or terminate" another's trespass or other tortious or criminal interference with property. (Ill.Rev.Stat. 1987, ch. 38, par. 7-3) The evidence showed that defendant was not acting to prevent or terminate a trespass by Glisch and Lietz at the time he fired the gun.

While defendant relies upon People

v. Service (1977), 48 Ill.App.3d 231, 363 N.E.2d 57, to support his claim of self-defense, the facts of that case are clearly distinguishable. Defendant in Service testified that the complainant had chased her in her apartment and was about to enter her bedroom when defendant picked up an unloaded shotgun. The complainant did not testify and the only State witness did not contradict defendant nor was he paying any attention to defendant for several minutes. Thus, a reasonable doubt of guilt arose. Here, two State witnesses offered evidence regarding the physical altercations with defendant; the evidence showed that any trespass had terminated; and defendant did not reasonably believe he was defending himself or his property when he fired the gun.

The judgment of the circuit court is affirmed. Pursuant to the State's request under People v. Nicholls (1978), 71 Ill.2d 166, 374 N.E.2d 194, defendant is assessed $50 as costs for this appeal.

Affirmed.

SCARIANO, J., with DiVITO, P.J., and BILANDIC, concurring.

ILLINOIS SUPREME COURT

February 6, 1991

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No. 71126 - People State of Illinois, respondent, v. George Matuska, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Bilandic, J., took no part.

The mandate of this Court will issue to the Appellate Court on February 28, 1991.

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, should not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

United States Constitution, Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.